In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-27

JEROME S. MURRAY AND GRACE H. MURRAY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner[1] brought this suit for refund of 1965 federal income taxes in the United States Court of Claims. Insofar as is here relevant, petitioner claimed that the proceeds of two installment sales of real property should be characterized as capital gains, and not, as the Commissioner had determined, as ordinary income. The sales themselves had been made in 1945 (the Wilson property) and in 1955 (the Gordon property). In a suit involving taxes for 1957 and 1961, the Tax Court had determined that the sale of the Gordon property had been made by petitioner in the course of his business as a real estate dealer and the gain on the sale was therefore ordinary and not capital. *Murray* v. *Commissioner*, 24 T.C.M. 762 (Pet. App. 39a-106a), affirmed *per curiam*,

[1] All references will be to petitioner Jerome S. Murray, whose wife is a party only because they filed a joint income tax return.

370 F. 2d 568 (C.A. 4) (Pet. App. 106a-107a), certiorari denied, 389 U.S. 834.

In the court below, the government moved for partial summary judgment on the ground that the prior litigation collaterally estopped petitioner's renewed claim that the proceeds from the sale of the Gordon property should be treated as capital gain. This motion was granted and petitioner's suit with respect to that issue was dismissed on May 15, 1970 (Pet. App. 3a-15a). After a subsequent trial before a commissioner on March 30, 1973, the court adopted (Pet. App. 38a) the commissioner's recommended decision (Pet. App. 16a-37a) that the gain on the sale of the Wilson property also was ordinary and not capital. Petitioner here challenges the court's holdings on both issues.

1. The court below, in granting summary judgment with respect to the proceeds from the sale of the Gordon property, correctly applied the doctrine of collateral estoppel in accordance with *Commissioner* v. *Sunnen*, 333 U.S. 591. Petitioner contends that *Malat* v. *Riddell*, 383 U.S. 569, which was decided after the Tax Court decision in petitioner's previous suit but before that decision was affirmed by the Fourth Circuit on appeal, constituted an intervening change in the law that barred the application of collateral estoppel. But this contention is wrong for two separate reasons. First, since petitioner's prior suit was not terminated until after the decision in *Malat* v. *Riddell*, that decision in no sense "intervened" between petitioner's two suits. There has been no change in the applicable law since termination of petitioner's prior suit. Thus the normal principles of estoppel apply to this suit.

Second, as both the Fourth Circuit on petitioner's earlier appeal (Pet. App. 107a) and the court below (Pet.

App. 13a) recognized, the original Tax Court decision was consistent with this Court's subsequent holding in *Malat* v. *Riddell*. The issue in *Malat* was whether, for purposes of the definition of "capital asset" in Section 1221 of the Internal Revenue Code of 1954, 26 U.S.C. 1221, property is held "primarily for sale to customers" when the taxpayer's substantial but not principal purpose in holding the property is to sell it in the ordinary course of business; this Court held that unless selling in the ordinary course of business is the taxpayer's *principal* purpose, the property would be treated as a capital asset. In petitioner's first suit, the Tax Court expressly held (Pet. App. 84a, n. 6) that the Gordon property had been held by petitioner as a real estate dealer for the *principal* purpose of sale in the ordinary course of business and that it was therefore not a capital asset. Thus, *Malat* did not represent a change in the law as it had been applied to petitioner.

2. Petitioner challenges the decision below with respect to the Wilson property solely on the ground that the finding concerning his principal purpose in holding that property was erroneous. That factual issue warrants no further review. Moreover, the finding—that petitioner held the property principally for sale in the ordinary course of business—was supported by substantial evidence. During the year of sale, petitioner had owned 44 properties similar to the Wilson property and had sold 21 of those properties (Pet. App. 23a-24a). There was ample evidence showing that petitoner's standard operating procedure was to buy properties for renovation, short-term rental and sale, *i.e.*, that he was a dealer, not an investor (see Pet. App. 23a-25a).[2]

[2] Petitioner claims (Pet. 13-14) that the court below applied an erroneous burden of proof standard. But the court indicated that petitioner in fact had simply failed to adduce *any* evidence of "any pupose other than resale at a profit in the regular course of his real estate business" (Pet. App. 25a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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